HUE NGEE ON

v.

CHAI WOO SIEN
(SEBAGAI PEGAWAI AWAM PERSATUAN HAKKA KULAI, JOHOR)

COURT OF APPEAL, PUTRAJAYA
LOW HOP BING JCA
HASAN LAH JCA
ABDUL MALIK ISHAK JCA
[CIVIL APPEAL NO: J-02-28-2004]
8 JUNE 2009

CIVIL PROCEDURE: *Fresh evidence - Application to adduce fresh evidence before Court of Appeal - Whether admissible - Whether to be allowed - Ladd v. Marshall, principles of - Statutory provisions - Rules of the Court of Appeal 1994, r. 7(1), (3A)(a)*

The respondent ('the Association') had purchased a piece of land from the father of the appellant, one Hue Tiam, since deceased. Following the demise of Hue Tiam, the appellant refused to effectuate the transfer of the property to the Association, with the result that an action for a vesting order was commenced by the Association. A vesting order was granted by the High Court by a decision given on 2 December 2003, and the appellant appealed. In the meanwhile, the Association has had sight of exhibits which would prove beyond any doubt that it was the registered proprietor of the land, and that being so, at the onset of the hearing of the appeal herein, applied to admit an affidavit by one Lee Soon Loy affirming that the land was on 8 January 2004 duly vested and registered in the name of the Association free from all encumbrances. It goes without saying that any admission of the said affidavit as fresh evidence would result in the striking out of the appeal, and hence the appellant's objection to the application hereof. Be that as it may, before the learned Justices of Appeal, the primary issue that arose was whether the affidavit as sought to be admitted would in law come within the contemplation of r. 7(1) and (3A)(a) Rules of the Court of Appeal 1994 – as well as the principles as laid down in *Ladd v. Marshall*, namely that: (i) at the hearing before the High Court, the new evidence was not available to the Association; and (ii) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

Held (admitting new evidence and striking out appeal)
Per Low Hop Bing JCA:

(1) *Vide* the affidavit, Lee Soon Loy affirmed that the land was on 8 January 2004 vested and registered in the name of the Association free from all encumbrances. The Association appeared as the registered proprietor of the land in the issue document of title ('the title'). The title is relevant and material, as it showed that the registration of the transfer was not available at the hearing before the High Court on 2 December 2003 and that the registration or vesting of the title occurred after the High Court order. Hence, the title would have had or would have been likely to have had a determining influence upon the decision of the Court of Appeal. The conditions of r. 7(1) and (3A)(a) having been fulfilled, this court would therefore admit the affidavit (including the exhibits) as further evidence. (para 8)

(2) After the admission of the further evidence under r. 7(1) and (3A)(a), it was abundantly clear that the Association as registered proprietor of the land had acquired indefeasibility of title with effect from 8 January 2004. (para 10)

(3) The Association had on completion of the sale and purchase taken possession of the land for more than 34 years but no action whatsoever had been taken by Hue Tiam or the appellant to recover possession of the land within the period. In the circumstances, s. 9(1) of the Limitation Act 1953 which prescribed a limitation period of 12 years applied to render the appellant's action in the High Court statute barred. Additionally, the private caveat which the appellant lodged some nine years ago against the land had also lapsed by virtue of s. 328 of the National Land Code. (paras 10, 11 & 12)

Per Abdul Malik Ishak JCA (concurring):

(1) It cannot be denied that *Ladd v. Marshall* together with the statutory rules in the Rules of the Court of Appeal 1994 provided a systematic and principled guidance for this court to follow. (para 27)

(2) The facts were all in favour of the respondent. The respondent was not the registered proprietor of the land at the time of the High Court order of 2 December 2003, and even with the exercise of reasonable diligence, the fresh

evidence, having been available only on 8 January 2004, would not have been available for use in the High Court on that date. And apart from the applicability of s. 9(1) of the Limitation Act 1953 and s. 328 of the National Land Code, the admission of the fresh evidence under r. 7(1) read with r. 7(3A)(a) of the Rules of the Court of Appeal meant that the respondent, as the registered proprietor of the said land, stood on firmer ground. This court would not stand in the way of doing justice to an applicant who wanted to admit fresh evidence like the present application of the respondent. (paras 29, 30, 34 & 35)

Bahasa Malaysia *Translation Of Headnotes*

Responden ('Persatuan') telah membeli sebidang tanah dari bapa perayu yang bernama Hue Tiam, si mati. Setelah kematian Hue Tiam, perayu enggan melaksanakan pindahmilik hartanah kepada Persatuan, yang berakhir dengan Persatuan mengemukakan tindakan untuk mendapatkan perintah letakhak. Suatu perintah letakhak kemudian telah dibuat oleh Mahkamah Tinggi melalui keputusan bertarikh 2 Disember 2003, dan berikutnya perayu merayu. Sementara itu, Persatuan telah memperoleh beberapa eksibit yang sekaligus menunjukkan bahawa Persatuan tanpa apa-apa keraguan adalah pemilik berdaftar tanah, dan ekoran perkembangan tersebut, sebaik sahaja pendengaran rayuan di sini bermula, Persatuan memohon untuk memasukkan satu afidavit oleh seorang Lee Soon Loy yang mengikrarkan bahawa tanah tersebut pada 8 Januari 2004 telahpun diletakhak dan didaftarkan atas nama Persatuan bebas dari segala halangan. Tidak dinafikan bahawa jika afidavit berkenaan diterima-masuk sebagai keterangan baru, maka rayuan di sini semestinya akan dibatalkan, dan ini sekaligus menjelaskan mengapa permohonan telah dibantah oleh perayu. Walau apa pun, di hadapan hakim-hakim rayuan, persoalan penting yang berbangkit adalah sama ada afidavit yang hendak dikemukakan di sini dirangkumi oleh peruntukan k. 7(1) dan (3A)(a) Kaedah-kaedah Mahkamah Rayuan 1994 – serta prinsip-prinsip yang dibentang di dalam *Ladd v. Marshall*, iaitu: (i) di pendengaran di hadapan Mahkamah Tinggi, keterangan baru tersebut tidak dapat diperolehi oleh Persatuan; dan (ii) keterangan baru tersebut, jika ianya benar, akan atau berkemungkinan akan mempunyai kesan penentuan terhadap keputusan Mahkamah Tinggi.

Diputuskan (menerima-masuk keterangan baru dan membatalkan rayuan)
Oleh Low Hop Bing HMR:

(1) Melalui afidavitnya, Lee Soon Loy mengikrarkan bahawa tanah pada 8 Januari 2004 telah diletakhak dan didaftarkan atas nama Persatuan bebas dari segala halangan. Maka Persatuan tercatat sebagai pemilik berdaftar pada geran hakmilik tanah ('hakmilik'). Hakmilik adalah relevan dan material, kerana ia menunjukkan bahawa pendaftaran pindahmilik tidak dapat diperolehi semasa pendengaran di hadapan Mahkamah Tinggi pada 2 Disember 2003 dan bahawa pendaftaran atau perletakhakan hakmilik berlaku selepas perintah berkenaan dibuat oleh Mahkamah Tinggi. Oleh itu, hakmilik akan atau berkemungkinan akan mempunyai kesan penentuan terhadap keputusan Mahkamah Rayuan. Dengan syarat-syarat k. 7(1) dan (3A)(a) telah dipenuhi, maka mahkamah ini menerima-masuk afidavit (termasuk eksibit-eksibit) sebagai keterangan baru.

(2) Adalah amat jelas bahawa selepas penerimaan-masuk keterangan baru di bawah k. 7(1) dan (3A)(a) Persatuan selaku pemilik berdaftar tanah telah memperoleh hakmilik tak boleh disangkal berkuatkuasa 8 Januari 2004.

(3) Bermula dari termeterainya jual beli, Persatuan telah mengambil milikan tanah untuk tempoh melebihi 34 tahun, namun tiada sebarang tindakan diambil oleh Hue Tiam mahupun perayu untuk mengambil balik milikan tanah dalam tempoh itu. Oleh hal yang demikian, s. 9(1) Akta Had Masa 1953 yang menetapkan tempoh had masa 12 tahun adalah terpakai sekaligus menjadikan guaman perayu di Mahkamah Tinggi terhalang oleh had masa. Begitu juga, kaveat persendirian yang dimasukkan oleh perayu lebih kurang sembilan tahun lalu telah menjadi luput berasaskan peruntukan s. 328 Kanun Tanah Negara.

Oleh Abdul Malik Ishak HMR (menyetujui):

(1) Ianya tidak boleh dinafikan bahawa *Ladd v. Marshall* serta kaedah-kaedah statutori dalam Kaedah-Kaedah Mahkamah Rayuan 1994 telah menyediakan panduan-panduan yang sistematik dan berprinsip untuk diikuti oleh mahkamah ini.

(2) Fakta-fakta semuanya menyebelahi responden. Responden bukanlah pemilik berdaftar pada waktu perintah Mahkamah Tinggi pada 2 Disember 2003, dan walaupun dengan melakukan usaha-usaha yang munasabah, keterangan baru tersebut, yang hanya dapat diperolehi pada 8 Januari 2004, tidak mungkin dapat dikemukakan di Mahkamah Tinggi pada tarikh perintah tersebut. Juga, selain dari keterpakaian s. 9(1) Akta Had Masa 1953 serta s. 328 Kanun Tanah Negara, penerimaan-masuk keterangan di bawah k. 7(1) dibaca dengan k. 7(3A)(a) Kaedah-Kaedah Mahkamah Rayuan bermakna responden, selaku pemilik berdaftar tanah, berdiri atas kedudukan yang lebih teguh. Mahkamah ini tentunya tidak akan menjadi batu penghalang bagi pelaksanaan keadilan ke atas seseorang pemohon yang hendak memasukkan keterangan baru sepertimana yang dibuat oleh responden melalui permohonannya di sini.

Case(s) referred to:

Au Meng Nam & Anor v. Ung Yak Chew & Ors [2007] 4 CLJ 526 CA ***(refd)***

Breskvar And Another v. Wall And Others [1971] 126 CLR 376 ***(refd)***

Chasfild Pty Ltd v. Taranto and Another [1991] 1 VR 225 ***(refd)***

Ellis v. Leeder [1950-1951] 82 CLR 645 ***(refd)***

Frazer v. Walker And Others [1967] 1 All ER 649 ***(refd)***

Gibbs v. Messer McIntyres And Cresswell [1891] AC 248 ***(refd)***

Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC ***(refd)***

Ladd v. Marshall [1954] 3 All ER 745 ***(foll)***

Ng Kheng Yeow v. Chiah Ah Foo & Ors [1987] 2 CLJ 108; [1987] CLJ (Rep) 254 SC ***(refd)***

Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd [1998] 2 CLJ 909 CA ***(refd)***

Sinanide v. La Maison Cosmeo [1927-1928] 44 TLR 574 ***(refd)***

Teh Bee v. K Maruthamuthu [1977] 2 MLJ 2 ***(refd)***

Legislation referred to:

Federated Malay States Land Code 1928, s. 42

Limitation Act 1953, s. 9(1)

National Land Code, ss. 328, 340

Rules of the Court of Appeal 1994, r. 7(1), (3A)(a)

South Australia Real Property Act 1886 [Aust], s. 69

Other source(s) referred to:

Peter Butt, *The Conveyancer – Indefeasibility and Sleights of Hand,* [1992] 66 ALJ 596

For the appellant - HK Tan; M/s HK Tan & Co
For the respondent - Dr Wong Kim Fatt (Wong Boon Lee with him); M/s Gulam & Wong

[Appeal from High Court, Johor Bahru; Originating Summons No: 24-1633-2003 (2)]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Low Hop Bing JCA:

Notice Of Motion

[1] This is the respondent's application by way of notice of motion in encl. (27a) which seeks to admit encl. (27b) ie the supporting affidavit (including the exhibits) of one Lee Soon Loy, affirmed on 16 January 2009, as further evidence; and to strike out the appellant's appeal. No affidavit in reply was filed.

Factual Background

[2] In 1967, the respondent ie the Hakka Association Kulai Johor ("the Association") purchased the land held under PTB 822, HS(D) 23377 in the township of Kulai ("the land") measuring 156.0771 sq. metres or 1,680 sq. ft. from the previous registered proprietor, one Hue Tiam, the father of the appellant, at a consideration of RM9,800. The Association paid the balance of the purchase price to the previous registered proprietor in 1974. The Association, as beneficial owner thereof, has been in possession of the land since 1974. The Association built the shophouse on the land at a cost of RM136,752.50. At all material times, the Association has been holding the issue document of title, paying all the quit rents and assessments for the land.

[3] On 9 August 2000, the appellant entered a private caveat against the land, but took no further action to enforce his rights, if any.

[4] On 2 December 2003, the Johor Bahru High Court judge made a vesting order ("the High Court order") in favour of the Association. On 8 January 2004, transfer of the land to the Association was perfected.

Admissibility Of Further Evidence

[5] Appellant's learned counsel Ms HK Tan objected to the Association's application to admit the affidavit (including the exhibits) as further evidence. She argued that the appeal should be heard, instead of being struck out at this stage.

[6] In response, the Association's learned counsel Dr Wong Kim Fatt (assisted by Mr Wong Boon Lee) submitted that the affidavit (including the exhibits) should be admitted as further evidence in order to establish that the Association is the registered proprietor of the land, as a result of which the appellant's appeal should be struck out.

[7] We shall first consider the Association's prayer for the admissibility of further evidence. The governing principles enunciated in *Ladd v. Marshall* [1954] 3 All ER 745 have been accorded statutory recognition in r. 7(1) and (3A)(a) of the Rules of the Court of Appeal 1994. Pursuant to this rule, this court is given full discretionary power to, *inter alia*, receive further evidence eg, by affidavit, so long as the court is satisfied that:

(a) at the hearing before the High Court, the new evidence was not available to the Association ie the party seeking to use it, or reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

[8] *Vide* the affidavit, the said Lee Soon Loy affirms, *inter alia*, that the land was on 8 January 2004 duly vested and registered in the name of the Association free from all encumbrances. The Association appears as the registered proprietor of the land in the issue document of title ("the title"). The title to the land is relevant and material evidence, showing that the registration of the transfer was not available at the hearing before the High Court on 2 December 2003 and that the registration or vesting of the title occurred after the High Court order. The title would have had or would have been likely to have a determining influence upon the decision of the Court of Appeal. We are of the view that the conditions of r. 7(1) and (3A)(a) have been fulfilled and we admitted the affidavit (including the exhibits) as further evidence.

[9] Prior to the further evidence, the Association was not the registered proprietor. However, it was the beneficial owner of the land, and had the better equity than the appellant: see *Ng Kheng Yeow v. Chiah Ah Foo & Ors* [1987] 2 CLJ 108; [1987] CLJ (Rep) 254, per Lee Hun Hoe CJ (Borneo) (as he then was).

[10] After the admission of the further evidence under r. 7(1) and (3A)(a), it is abundantly clear to us that the Association as registered proprietor of the land has acquired indefeasibility of title with effect from 8 January 2004: *Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 7 FC, which was referred to in *Au Meng Nam & Anor v. Ung Yak Chew & Ors* [2007] 4 CLJ 526, 538C CA. Registration of the Association as proprietor of the land is conclusive evidence that the title is vested in the Association. This is in line with the doctrine of indefeasibility of title under s. 340 of the National Land Code 1965.

[11] Further, since 1974, the Association, on completion of the sale and purchase, had taken possession of the land for more than 34 years. The previous registered owner Hue Tiam or his son, the appellant, took no action whatsoever to recover possession of the land. Hence, s. 9(1) of the Limitation Act 1953 which prescribes a limitation period of 12 years, commencing from the date on which the right of action accrued, to recover land, applies to the instant appeal so as to render the appellant's action in the High Court statute barred.

[12] Next, after the private caveat was entered by the appellant against the land on 9 August 2000 ie, some nine years ago, the appellant had not taken any timeous action in court to enforce his rights, if any. Section 328 of the National Land Code 1965 provides for the lapse of a private caveat at the expiry of six years from the time the caveat took effect. The private caveat had clearly lapsed: *Paya Terubong Estates Sdn Bhd v. Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463 CA pp. 468I and 469A-B. With the lapse of the private caveat, the appellant no longer has any interest or capacity *vis-à-vis* the land.

Conclusion

[13] By reason of the foregoing grounds, we allowed the Association's application in encl. (27a). Consequentially, the appellant's appeal was struck out with costs.

Abdul Malik Ishak JCA:

Introduction

[14] By way of encl. 27a, the respondent (The Hakka Association Kulai, Johor) sought for two orders, namely:

(a) to admit, under r. 7(1) and r. 7(3A)(a) of the Rules of the Court of Appeal 1994, the whole of the supporting affidavit of Mr. Lee Soon Loy (encl. 27b) affirmed on 16 January 2009 as the registration or vesting of the title to the land in question on 8 January 2004 occurred after the High Court order of 2 December 2003; and

(b) to strike out or dismiss the appeal of the appellant.

[15] Prayer (a) of encl. 27a prayed for the reception of fresh evidence while prayer (b) to the same enclosure prayed to either strike out or dismiss the appeal.

Analysis

[16] The conditions stated in *Ladd v. Marshall* [1954] 1 WLR 1489, CA, have been followed by the English Court of Appeal for more than half a century and are in no way in conflict with the overriding objective of dispensing justice to the litigants. It must be borne in mind that it will not be in the interests of justice to re-open a concluded trial in order to introduce fresh evidence unless that evidence will probably influence the result of the case (this is the second of the conditions stated in *Ladd v. Marshall*).

[17] One must not distract from the fact that the question of whether fresh evidence should be received is entirely a matter of discretion to be exercised in a principled way. Whether fresh evidence is admissible upon an application under r. 7(3A)(a) of the Rules of the Court of Appeal 1994, that is to say, that fresh evidence was not available to the respondent who wanted to use it before the High Court on 2 December 2003 or that the fresh evidence which could not with reasonable diligence have been obtained in time for the hearing before the High Court on 2 December 2003 is entirely one of subjective satisfaction for this court to satisfy itself. And may I add that whether the fresh evidence might and should have been obtained with reasonable diligence at the High Court hearing on 2 December 2003 – that will be a factor for this court to take into account in its deliberation.

[18] To object to the receiving of fresh evidence where that would trigger a re-trial as in *Ladd v. Marshall*, is entirely different from a situation where one objects to the receiving of fresh evidence on an appeal by way of a re-hearing. The distinction can be seen in *Ellis v. Leeder* [1950-1951] 82 CLR 645, in the judgment of Dixon, Williams and Kitto JJ (at p. 655) where it was said that a Court of Appeal invited to receive further evidence to enable it better to determine an appeal which is before it is exercising a different function to a court concerned with the justice of setting aside a decision obtained after a full trial and sending the case back for a new trial. In the former situation, the purpose of the further evidence is to enable the Court of Appeal to appraise the facts and be in a better position to reach a final determination of the proceeding. Now, by virtue of r. 7(1) read with r. 7(3A)(a) of the Rules of the Court of Appeal 1994, the power to receive evidence on an appeal by way of re-hearing is statutory and discretionary. And whether the discretion is exercised one way or the other depends ultimately on the facts of each case. However, there may be cases where it will be thought proper to admit fresh evidence on an appeal by way of a re-hearing simply on the ground that it appears just to do so as was done in *Sinanide v. La Maison Cosmeo* [1927-1928] 44 TLR 574.

[19] The germane facts are set out in the affidavit in support of Lee Soon Loy that was affirmed on 16 January 2009 and my learned brother Low Hop Bing, JCA has correctly set them out in clear terms in his judgment. The land in question is the centre of dispute between the parties.

[20] The respondent sought to admit the whole of the supporting affidavit of Lee Soon Loy in order to categorically establish that the respondent is the registered proprietor of the land in question which would vest the respondent with indefeasibility of title with effect from 8 January 2004. This piece of evidence was not available before the learned High Court judge when he made the order on 2 December 2003. This was the basis and the plank of the arguments advanced by the respondent's learned counsel in the person of Dr. Wong Kim Fatt who was assisted by Mr. Wong Boon Lee in seeking to admit the supporting affidavit of Lee Soon Loy. And flowing from that, Dr. Wong Kim Fatt submitted that the appellant's appeal should be struck out forthwith.

[21] Miss HK Tan, the learned counsel for the appellant, objected to the respondent's application to admit the whole of the supporting affidavit of Lee Soon Loy as fresh evidence. She implored this court to hear the appeal instead of striking out the appeal at this point of time.

[22] Denning LJ, in delivering a separate judgment in *Ladd v. Marshall*, laid down the law in this way (see p. 1491):

> To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

[23] The three conditions in *Ladd v. Marshall* must be fulfilled before this court would be prepared to receive the whole of the supporting affidavit of Lee Soon Loy as fresh evidence. In the context of adjudicating the respondent's application to admit fresh evidence in encl. 27a, all the three conditions in *Ladd v. Marshall* have been fulfilled to the core.

[24] The three conditions laid down in *Ladd v. Marshall* may be paraphrased in this way. That the fresh evidence, firstly, could not have been obtained with reasonable diligence for use at the trial; secondly, would probably have an important influence on the result of the case, although it need not be decisive; and, thirdly, must be apparently credible, though it need not be incontrovertible.

[25] Then there is r. 7(1) of the Rules of the Court of Appeal 1994 which states as follows:

> **7 Power of Court to amend, admit further evidence, or draw inferences of fact**
>
> (1) The Court shall have all the powers and duties, as to amendment or otherwise, of the appropriate High Court, together with full discretionary power to receive further evidence by oral examination in Court, by affidavit, or by the deposition taken before an examiner or Commissioner.

[26] While r. 7(3A)(a) of the Rules of the Court of Appeal 1994 reads as follows:

> **7 Power of Court to amend, admit further evidence, or draw inferences of fact**
>
> (3A) At the hearing of the appeal further evidence shall not be admitted unless the Court is satisfied that:
>
> (a) at the hearing before the High Court or the subordinate court, as the case may be, the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; …

[27] It cannot be denied that *Ladd v. Marshall* together with the statutory rules in the Rules of the Court of Appeal 1994 as alluded to above have provided a systematic and principled judicial guidance for this court to follow and adhere to.

[28] Yet, there were cases where the courts had admitted fresh evidence without reference to the principles in *Ladd v. Marshall*. This would relate to cases that turned on the legality of a ministerial decision. In an unreported dissenting judgment in the Court of Appeal *vide* Civil Appeal No: P-04-50-2006, *Teoh Kien Peng and Another v. Thannimalai a/l Subramaniam*, I had occasion to say something about such cases and this was what I said at pp. 25 to 26, at paras [44] to [45]:

> [44] There were cases in the past where the courts had admitted fresh evidence without even referring to the principles in *Ladd v. Marshall*. This involved cases which turned on the legality of a ministerial decision where the evidence was not available when the Minister made the initial determination and where the Minister was regarded, all along, as having responsibility over the matter. In this connection, two cases immediately come to the forefront. The first would be the case of *Regina v. Secretary of State for the Home Department, Ex parte Launder* [1997] 1 WLR 839 at 860 to 861. The second would be the case of *Regina v. Secretary of State for the Home Department, Ex parte Simms And Another* [2000] 2 AC 115 at 127.
>
> [45] Notwithstanding the fact that the error could have been spotted by the applicant's advisers at the time of the decision by the Immigration Appeal Tribunal ("IAT"), the Court of Appeal in *Tewedros Tadesse Haile v. Immigration Appeal Tribunal* [2001] EWCA Civ 663, [2002] INLR 283 allowed the error to be rectified by adducing fresh evidence in order to show the identity

of the Ethiopian political party with which the applicant was connected. Simon Brown LJ acknowledged that the evidence would not have passed the first condition under the *Ladd v. Marshall* test because the mistake should have been noticed by the applicant's advisers before the IAT gave its decision but his Lordship was prepared to hold that the principles underlying that decision which was that there must be finality in litigation were applicable subject to the overriding judicial discretion to depart from them provided the wider interests of justice so required.

[29] What appears to be just and the justice of the case are reasons that would allow for admission of fresh evidence by way of a re-hearing. I would certainly not stand in the way of doing justice to an applicant who wants to admit fresh evidence like the present application of the respondent in encl. 27a. Permit me, once again, to refer to my unreported dissenting judgment in the Court of Appeal *vide* Civil Appeal No: P-04-50-2006, *Teoh Kien Peng and Another v. Thannimalai a/l Subramaniam*. There at pp. 23 to 24, at paras [40] to [43], I had this to say:

[40] Should we slavishly follow *Ladd v. Marshall* or should we be freed from its strait-jacket three conditions? Sad to say, it is the courts that let the three conditions in *Ladd v. Marshall* to be compartmentalised as a strait-jacket. For my part, I will not let *Ladd v. Marshall* to stand in the way of doing justice to an individual case. Old vintage cases like *Scott v. Scott* [1863] 3 Sw. & Tr. 320, 325, The English Reports volume 164, p. 1298, at 1300; and *Brown v. Dean And Another* [1910] AC 373 should be referred to and these two cases have been overshadowed and ignored and put into oblivion since the arrival of *Ladd v. Marshall* in 1954. The court said in *Scott v. Scott (supra)* that:

> It has never been the habit in Westminster Hall to grant new trials on the simple ground that the party could make the same case stronger by corroborating testimony (even though newly discovered) if another trial were allowed. And if it were otherwise, there are few cases that would not be tried a second time.

[41] Lord Loreburn LC in *Brown v. Dean (supra)* said that when a litigant has obtained a judgment in a court of justice he is by law entitled not to be deprived of that judgment without very solid grounds and where the ground concerns the alleged discovery of new evidence, 'it must at least be such as is presumably to be believed, and if believed, would be conclusive.

A [42] Cases may arise in future where it would be proper to admit fresh evidence on an appeal by way of a re-hearing on the simple ground that it appears just to do so and nothing else (*Sinanide v. La Maison Cosmeo* [1927-1928] vol: XLIV, The Times Law Reports 574). An objection may be raised to the receipt of fresh evidence where that would trigger a re-trial like the case of *Ladd* B *v. Marshall* as opposed to an objection of receiving fresh evidence on an appeal by way of a re-hearing. The distinction between these two was set out in the case of *Ellis v. Leeder* [1950-1951] Vol. 82 CLR 645 and there at page 655 it was held that a Court of Appeal invited to receive further evidence was to enable it to C be placed in a better position to determine an appeal which was before it whereas a court concerned with the setting aside of the decision obtained after a regular trial would send the case down for a new trial.

D [43] According to the case of *Sara Lee Household & Body Care U.K. Ltd v. Johnson Wax Ltd* [2001] Fleet Street Reports 17, it would require an exceptional case before the court was prepared to accede to an application to adduce new evidence where the applicant could not satisfy the three conditions in *Ladd v. Marshall.*

E **[30]** Here, factually speaking, at the time of the High Court order of 2 December 2003, the respondent was not the registered proprietor of the said land. With the admission of the fresh evidence under r. 7(1) to be read with r. 7(3A)(a) of the Rules of the Court of Appeal 1994 the respondent, as the registered F proprietor of the said land, stands on firmer ground. According to Peter Butt, *"The Conveyancer – Indefeasibility and Sleights of Hand"* [1992] 66 ALJ 596 at p. 597 that:

> Public confidence in the Torrens system depends upon the rock-solid effect of registration.

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[31] And according to the case of *Gibbs v. Messer McIntyres And Cresswell* [1891] AC 248 at p. 254, the public faith in the Torrens system is reinforced by the indefeasibility concept which serves as a shield to protect against attacks on title. And that indefeasibility H is the fundamental feature of all Torrens systems which save the persons dealing with the registered proprietors from the trouble and expense of going behind the register.

[32] In Australia, the pronouncement by Barwick CJ in *Breskvar And Another v. Wall And Others* [1971] 126 CLR 376 at p. 385 I that, "The Torrens system of registered title of which the Act is a form is not a system of registration of title but a system of title

by registration" settled, once and for all, the lingering doubts of the decision of *Frazer v. Walker And Others* [1967] 1 All ER 649. Since *Breskvar And Another v. Wall And Others*, the immediate indefeasibility view taken by the High Court has prevailed as the law in Australia despite the diversity in expression by other judges there particularly in *Chasfild Pty. Ltd. v. Taranto and Another* [1991] 1 VR 225.

[33] Back home, we have s. 340 of the National Land Code 1965 ("NLC"). This provision was drafted based on s. 42 of the FMS Land Code 1928 and it corresponds quite closely to s. 69 of the South Australia Real Property Act 1886 and this provision is paramount and it confers indefeasibility in the Malaysian Torrens system (*Teh Bee v. K. Maruthamuthu* [1977] 2 MLJ 2 at p. 10 FC; and *Keng Soon Finance Bhd v. MK Retnam Holdings Sdn Bhd & Anor* [1989] 1 CLJ 897; [1989] 1 CLJ (Rep) 1 PC).

[34] Commencing from 1974, the respondent took possession of the said land for more than 34 years upon completion of the sale and purchase transaction. The appellant's father, Mr. Hue Tiam, did not take any action whatsoever to repossess the said land and by virtue of s. 9(1) of the Limitation Act 1953 which sets out the limitation period of 12 years, the appellant's action in the High Court was statute barred. There was nothing for the appellant to hold onto. Even the private caveat which the appellant entered against the said land on 9 August 2000 – some nine years ago, had lapsed by virtue of s. 328 of the NLC.

[35] All the facts favoured the respondent. With the admission of the fresh evidence in the form of the whole of the supporting affidavit of Lee Soon Loy, the respondent's position was further strengthened. Even with the exercise of reasonable diligence, the fresh evidence would not have been available for use in the High Court on 2 December 2003. The fresh evidence to show that the respondent is the registered proprietor of the said land was only made available on 8 January 2004.

[36] The admission of fresh evidence would vary from case to case and from one situation to another. The complexion to a particular case would only change and would become apparent in the light of the fresh evidence like the present application in question. Allow me to demonstrate further by referring, once again, to my unreported dissenting judgment in the Court of

Appeal *vide* Civil Appeal No: P-04-50-2006, *Teoh Kien Peng and Another v. Thannimalai a/l Subramaniam*. There at pp. 43 to 46 and at paras [75] to [79], I had this to say:

> [75] I will now refer to the case of *Prentice v. Hereward Housing Association and East Cambridgeshire District Council* [2001] EWCA Civ 437, [2001] 2 All ER (Comm) 900, not cited by either party. The facts may be stated as follows. On 6.7.1994, the claimant fell on a grassed area outside his home and suffered serious injuries to his left ankle. Proceedings for damages were commenced against the first and second defendants, with the claimant alleging that the defendants had been in breach of their duties under the Occupiers' Liability Act 1957 and had also been negligent. The claimant and his wife both gave evidence to the effect that the claimant had gone outside his house wearing slippers, in order to shut the sun roof on his car, and had tripped in a large pot-hole. This evidence was not contradicted and the trial judge accepted the honesty of the witnesses and their account of the facts. The trial judge held that the second, but not the first, defendants were liable for the injuries. The trial judge also held that the claimant was 30% to blame for his own injuries and that being the case the claimant was entitled to 70% of the agreed damages of £340,000 and that would be for the sum of £238,000.00. The claim was handled by the second defendants' liability insurers.
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> [76] The trial was reported in the local newspaper. As a result of the judgment, a number of local residents contacted the first defendant and told them that the accident had not occurred as reported in the local newspaper. This prompted the second defendants' insurers to conduct inquiries and they succeeded in obtaining witness statements from seven local residents. The new witnesses stated that they had either seen the accident or were present in its aftermath or had been told by the claimant himself as to what had happened. Their versions were that the claimant had been bare-footed and that the accident occurred some three metres away from any pot-hole while the claimant was playfully chasing his stepson. The residents also stated in their witness statements that they were not aware that any claim had been made until they read the outcome of the trial in the local newspaper. The residents said that they were motivated in coming forward because they were shocked on learning that a false claim had been made against the defendants. Of course, all these were denied by the claimant and his wife.

[77] The second defendant then appealed to the English Court of Appeal seeking an order for a retrial so that the evidence of the additional witnesses could be considered by the trial judge. Under Rule 52.10(2) of the CPR, the English Court of Appeal has the power to order a re-trial. That provision re-enacts in the same terms as Order 59 rule 10(2) of the Rules of the Supreme Court: in the *Prentice* case the latter provision was operative because the former had not come into force at the relevant time. The English Court of Appeal ruled that the principles applicable under both regimes were the same. Those principles had been set out in *Ladd v. Marshall.*

[78] The English Court of Appeal was satisfied that each of the requirements in *Ladd v. Marshall* had been met and that a retrial should be ordered. It was held that the new evidence was sufficiently cogent to affect the outcome of the trial and that it was on its face to be believed. It was also held that the key issue was whether the new evidence could, with reasonable diligence have been discovered by the second defendant and their insurers prior to the original trial. The claimant asserted that the insurers should have carried out investigations as to the existence of the pot-hole and as to the circumstances of the accident; and according to the claimant this could have been done either by writing to those in the neighbourhood or by sending an investigating officer to the houses of the neighbours in order to ascertain what had happened.

[79] The main judgment of the English Court of Appeal in Prentice was delivered by Kay LJ. The learned judge held that this type of obligation was unrealistic. Liability insurers faced with such a claim were entitled to start on the assumption that the claim presented against the assured was a genuine one rather than based on the assumption that the claim was false and had to be investigated. In the absence of anything suspicious in the claim itself or arising from the insurers investigations, the claim was to be treated as honest. Flowing from all these, the learned judge held that the insurers had acted perfectly proper and were thus entitled to have the matter re-opened since the fresh evidence had come to light.

[37] The latitude to allow the reception of fresh evidence would depend on the facts of each case. In the circumstances, I would make those orders that were made by my learned brother Low Hop Bing, JCA.